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# TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible]

No. [illegible]

12

DEUTSCH-AUSTRALISCHE DAMPFSCHIFFS-GESELLSCHAFT, APPELLANT,

*vs.*

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JULY 5, 1894

(30,476)

(30,476)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1924

## No. 511

DEUTSCH-AUSTRALISCHE DAMPFSCHIFFS-GESELLSCHAFT, APPELLANT,

*vs.*

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

INDEX


| | Original | Print |
|---|---|---|
| Record from Court of Claims | 1 | 1 |
| Petition | 1 | 1 |
| Defendant's demurrer | 8 | 4 |
| Argument and submission of demurrer | 8 | 5 |
| Opinion, Campbell, Ch. J. | 9 | 5 |
| Order sustaining demurrer and dismissing petition | 16 | 12 |
| Plaintiff's application for appeal | 16 | 12 |
| Order of court allowing said application | 16 | 12 |
| Clerk's certificate | 17 | 12 |


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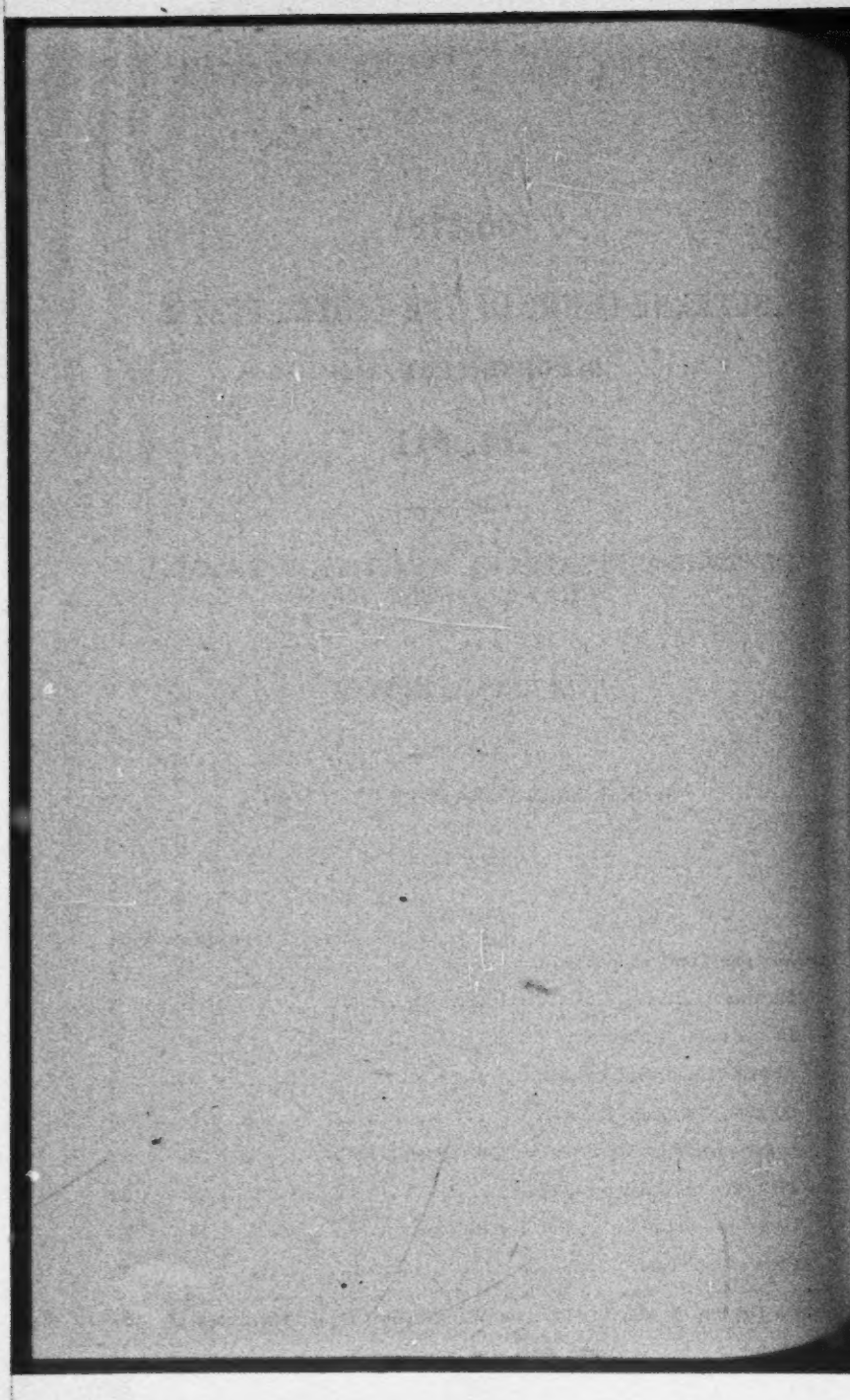

[fol. 1]

## COURT OF CLAIMS

No. C576

DEUTSCH-AUSTRALISCHE DAMPFSCHIFFS-GESELLSCHAFT, Claimant,

against

THE UNITED STATES, Defendant

I. PETITION—Filed May 11, 1923

To the honorable justices of said court:

The claimant, Deutsch-Australische Dampschiffs-Gesellschaft, appearing herein by Katz & Sommerich, as its attorneys, respectively shows the following:

1. That at all the times hereinafter mentioned the claimant was and now is a corporation organized and existing under and by virtue of the laws of Germany and engaged in the business of operating steamships between Germany and certain other foreign countries for the transportation of freight for hire, owning numerous steamships, and having its principal office and place of business at Hamburg, Germany.

2. That on or about the 12th day of May, 1917, the Senate and House of Representatives of the United States of America in Congress assembled duly passed and adopted a Joint Resolution authorizing [fol. 2] the President of the United States to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under registry of any such nation, and for other purposes, the same having been approved by the President of the United States on May 12, 1917. The said Joint Resolution is as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, That the President be and he is hereby authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter,

and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a [fol. 3] written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

3. That in or about the month of May and June, 1917, pursuant to authority granted unto him by the said Joint Resolution, Hon. Woodrow Wilson, President of the United States, as such President, took over to the United States the immediate possession and control of the following named steamers which then were within the jurisdiction of the United States or its insular possessions, and which were the sole and exclusive property of claimant and in its possession, enjoyment and use, and which then were of the fair and reasonable value set opposite their respective names, to wit as follows:

| Name of steamer | Fair and reasonable value of steamer at time of taking |
|---|---|
| "Elmshorn" | $1,420,000 |
| "Bochum" | 1,672,000 |
| "Esslingen" | 1,672,000 |
| "Kiel" | 1,424,000 |
| "Magdeburg" | 1,424,000 |
| "Harburg" | 1,410,000 |
| | $9,022,000 |

4. That by such taking the President of the United States did deprive the claimant of the use, enjoyment and benefit of such steamers, and the fair and reasonable value of such use, enjoyment and benefit of which the claimant was thus deprived was at the rate of Ten dollars ($10) per dead-weight ton per month, to be computed from the date of the taking of such steamers down to the date of making payment thereof. That the dead-weight tonnage of said steamers is set opposite their names, respectively, to wit:

| Name of steamer | Dead-weight tonnage |
|---|---|
| [fol. 4] "Elmshorn" | 8,070 |
| "Bochum" | 10,195 |
| "Esslingen" | 8,250 |
| "Kiel" | 7,180 |
| "Magdeburg" | 7,200 |
| "Harburg" | 7,220 |

5. That in addition to taking the said steamers, as aforesaid, the President of the United States took over to the United States, the immediate possession and control of stores of bunker coal, the number of tons taken from the said steamers being set opposite their respective names, as follows:

| Name of steamer | Number of tons |
|---|---|
| "Elmshorn" | 350 |
| "Bochum" | 148 |
| "Esslingen" | 275 |
| "Kiel" | 50 |
| "Magdeburg" | 170 |
| "Harburg" | 60 |

That in addition to such stores of bunker coal, the President of the United States, at the time of the taking over of the said steamers as aforesaid took over to the United States the immediate possession and control of the equipment, appurtenances and other property contained therein at the time of their taking.

6. That by taking over the immediate possession and control of the said steamers in the manner aforesaid, and thus appropriating the said steamers to its own use, enjoyment and benefit and thereby depriving the claimant of the use, enjoyment and benefit thereof, the United States impliedly agreed with claimant to pay to claimant the fair and reasonable value of said steamers, as well as compensation for the deprivation of the use, enjoyment and benefit thereof, [fol. 5] and for bunker coal, equipment, appurtenances and other property contained therein at the time of their taking, but has wholly failed and refused and still does fail and refuse to pay the same to claimant, although demand for the payment thereof has been duly made by the claimant.

7. That by reason of the circumstances aforesaid, there is now due and owing by the United States to the claimant the sum of $9,022,000, and in addition thereto an amount equal to Ten Dollars($10) per dead-weight ton per month for each of the said steamers from the date of taking of the same down to the date of the making of the payment thereof, and an amount equal to the fair and reasonable value of the bunker coal, equipment, appurtenances and other property contained in the vessels at the time of their taking.

8. That by virtue of the provisions of the said Joint Resolution, the Secretary of the Navy was required to appoint, subject to the approval of the President of the United States, a board of survey to ascertain the actual value of the said steamers, their equipment, appurtenances and all property contained therein at the time of their taking, and to make a written report of their findings to the Secretary of the Navy, the same to be preserved by him.

On information and belief, that pursuant to the said Joint Resolution the Secretary of the Navy did cause such a board of survey to be appointed for such purpose, and such board of survey did

appraise the value of the said steamers, their respective equipment, appurtenances and all property contained therein at the time of taking of such steamers, and did file its report with the Secretary of the Navy.

[fol. 6] 9. That no action has been had on this claim in Congress or by any of the departments except as hereinabove stated. The claimant is the sole owner of this claim, and the only person interested therein. No assignment or transfer of this claim or of any part thereof or interest therein has been made. The claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets.

10. That the claimant herein has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the United States of America.

11. That the claimant is a citizen of Germany, the government of which accords to citizens of the United States the right to prosecute Claims against such government, in its courts, and therefore, by virtue of the provisions of Section 1146 of the United States Compiled Statutes (Judicial Code, Section 155), the claimant herein has the privilege of prosecuting this claim against the United States in this Court.

12. That the claimant believes the facts as stated in this petition to be true.

Wherefore claimant demands judgment against the United States for the sum of $9,022,000, and in addition thereto an amount equal to Ten Dollars ($10) per dead-weight ton per month for each of the said steamers from the date of taking of the same down to the date of the making of the payment thereof, and an amount equal to the fair and reasonable value of the bunker coal, equipment, appurtenances and other property contained in the said vessels at the time of their taking, with any interest due thereon.

Katz & Sommerich, Attorneys for Claimant.

Office & P. O. Address 120 Broadway, City of New York, State of New York.

[fol. 7] Jurat showing the foregoing was duly sworn to by Otto C. Sommerich omitted in printing.

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[fol. 8] II. DEFENDANT'S DEMURRER.—Filed May 26, 1924

Defendant demurs to the petition in the above entitled case for the reason that it does not state a cause of action against the United States.

Robert H. Lovett, Assistant Attorney General. W. F. Norris, Attorney.

## III. Argument and Submission of Demurrer

On February 18, 19 and 20, 1924, the demurrers in this and other cases were argued by Mr. William F. Norris and Herman J. Galloway, for the defendant, and on February 18, 1924, by Mr. E. M. Borchard, for the plaintiff in this case, and the demurrer was submitted.

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[fol. 9] Deutsch-Australische Dampfschiffs-Gesellschaft

v.

The United States

## IV. Opinion of the Court.—Entered Mch. 17, 1924

Campbell, Chief Justice, delivered the opinion of the court:

This case is before the court upon the defendant's demurrer to the petition, which in substance avers: Plaintiff is a corporation organized and existing under the laws of Germany, and is a citizen of Germany, and at the times mentioned in the petition was engaged in the business of operating steamships, of which it was the owner of many, its principal office and place of business being at Hamburg, Germany. In or about the month of May or June, 1917, pursuant to authority granted by the joint resolution of May 12, 1917 (hereinafter set forth), the President of the United States "took over to the United States the immediate possession and conrtol" of the plaintiff's steamers which then were within the jurisdiction of the United States or its insular possessions and which were the sole and exclusive property of plaintiff and in its possession. The names of the six steamers and the alleged fair and reasonable value of each is stated, and the aggregate value was $9,022,000.

Also it is alleged that certain stores and equipment belonging to the several steamers were also taken over, and that by the taking over of the possession and control of the steamers in the manner stated and "thus appropriating the said steamers to its own use, enjoyment, and benefit," the United States impliedly agreed with plaintiff to pay plaintiff the fair and reasonable value of said steamers, and also for their stores and equipment, but that they have wholly failed and refused to pay the same. It is further averred that the survey required by section 2 of the joint resolution has been duly made and report thereof filed with the Secretary of the Navy. The claim is for the alleged aggregate value of the steamers besides the value of their coal, stores and equipment. A further claim of $10 per deadweight ton per month for each steamer as the value of its use is made in the petition, but the plaintiff abandoned this claim, insisting, however, upon the alleged value of its property. It was explained in argument that the several steamers, with the exception of those in Cuban harbors, were all in American harbors at the outbreak of the war. They were merchant vessels which had sought asylum in these

harbors and were left unmolested until the United States entered the war. There were fifteen other suits involving vessels of the alleged aggregate value of over $30,000,000 submitted with this one, besides a large number of similar cases heard at the same time.

[fol. 10] On April 6, 1917, the Congress adopted the joint resolution declaring the existence of a state of war between the United States and the Imperial Government of Germany. On that day some of the vessels in question were taken into possession and control by agents of the United States Government. On May 12, 1917, the Congress adopted a joint resolution as follows:

"Chap. 13. Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtennaces, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

By proclamation dated June 30, 1917, which incorporated the joint resolution of May 12 and mentioned by name 69 German ships, it was ordered by the President that "through the United States Shipping Board there be taken over to the United States the possession and title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip, and man the said vessels; to operate, lease, or charter the same in any service of the United States or in any commerce, foreign or coastwise; and to do and perform any and all things that may be neces

sary to accomplish the purposes of the joint resolution above set forth."

A question presented at the threshold is whether the Court of Claims has jurisdiction in the premises. The plaintiff contends that the allegations bring its case within the scope of section 145, Judicial Code, conferring power to hear and determine claims founded upon the Constitution or any law of Congress, or upon implied contract with the United States. The action is not founded upon the Constitution or a law of Congress. The joint resolution authorized the President to take title to the vessels and he did so. It does not in terms declare a liability of the Government or of itself create a right in plaintiff. It was said by Judge Richardson in Ludington's case, 15 C. Cls. 453, that to sustain a claim as one founded on a law of Congress there must be "a statute liability on the part of the Government." See Hukill case, 16 C. Cls. 562. In Hvoslef case, 237 U. S. [fol. 11] 1, 11, the statute authorized and directed the payment of certain claims. The act construed in the Medbury case, 173 U. S. 492, created the right to payment.

Where suits for compensation have been maintained because of the taking by the Government of private property for public use they were not founded upon the Constitution or the Fifth Amendment or a law of Congress, but upon an implied contract arising out of the circumstances of the taking. In United States v. Great Falls Mfg. Co., 112 U. S. 645, one of the earliest cases on the subject, the principle was announced, and it has been repeatedly reaffirmed. In United States v. North American Transportation & Trading Co., 253 U. S. 330, 335, it was said: "The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment, but upon the existence of an implied contract entered into by the United States." See Tempel case, 248 U. S. 121, 129; Peabody case, 231 U. S. 530, 539; Klebe case, — U. S. —, decided November 12, 1923 (57 C. Cls., 160). The circumstances of the case may rebut the implication of such a contract. Horstmann case, 257 U. S. 138, 146; Ball Engineering Co. v. White & Co., 250 U. S. 46, 57; Klebe Case, supra.

It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of Claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, § 8, cl. 11. See Stoehr v. Wallace, 255 U. S. 239, 242; Commercial Trust Co. v. Miller, 262 U. S. 51; Brown v. United States, 8 Cranch 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355. Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852. Several of these cases deal with the trading with the enemy act, but that act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken, as it was, it could

admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court.

In Brown v. United States, 8 Cranch 110, the Circuit Court had condemned certain pine lumber seized as enemy property. The court's action was sought to be sustained upon the mere fact of the declaration of war. This the Supreme Court said was not sufficient, but that legislative action was essential to confer upon courts authority to condemn enemy property. Chief Justice Marshall said, page 122: "That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but can not impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court." The court could not pronounce a sentence of condemnation in the absence of legis- [fol. 12] lative authority so to do. In the instant case the court is asked to order compensation for enemy property seized by authority of a legislative act that is silent on the question of jurisdiction. As already stated, the taking of private property for public use by the Government, and for which the Fifth Amendment requires compensation to be made, falls within the class of claims founded upon implied contract, and the duty imposed by this amendment is an essential element in raising the necessary implication of an agreement to pay.

But the limitations or restrictions of the Fifth Amendment do not affect the exercise of the war power conferred upon Congress when enemy property is taken. It was said in Miller v. United States, 11 Wall. 268, 304, that where the statutes were "an exercise of the war powers of the Government, it is clear they are not affected by the restrictions imposed by the Fifth and Sixth Amendments." (See Herrera case, 222 U. S. 558, 572.) It was added: "The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right." See Morrisdale Coal Co. Case, 55 C. Cls., 310, 315; Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852, 858; Fischer v. Palmer, 259 Fed. 355, 358.

In Green's Case, 10 C. Cls. 466, the facts were that the plaintiff, a citizen of the United States, was domiciled in Nashville, Tennessee. On the 16th day of February, 1862, while the capture of Nashville by the United States Army was imminent and expected, plaintiff went south with a large amount of his firm's moneys, which he took for investment. "While absent from his residence, he was not

engaged in giving aid or encouragement to the rebellion, other than such as might arise from his voluntarily leaving his domicile and remaining within the Confederate lines and having commercial dealings with the people." When he left Nashville he was the owner of certain rent-producing buildings occupied by tenants and left in charge of his agent. The agent continued to collect the rents and care for the buildings until December, 1864, when they were seized by the special supervising agent of the Treasury as abandoned property, who collected the rents until July 8, 1865. The suit brought in October, 1870, was to recover these rents. The authority for taking the property was the act of July 2, 1864, 13 Stat. 375, which did not in terms prescribe a remedy. The opinion of the court, delivered by Judge Nott, says that "the case presents, with unusual clearness, the question whether the Government is judicially liable for any of the war measures resorted to in the late rebellion other than the liability created by the abandoned or captured property act," and states the question to be whether the Government is liable for the acts of its officers, done under color of its authority within the insurrectionary district, where the party injured was loyal and the circumstances were such as would give a citizen in time of peace a right of action against the Government under the mandate of the Constitution that private property should not be taken for public [fol. 13] use without just compensation. Declaring that it made no difference in the applicable rule whether the property was taken by the Army or the Navy, or by an officer of the Treasury, the court concluded that the Government was not liable upon implied contract. The court said (p. 471): "It is inevitable that a war must be prosecuted rigorously, and it is desirable that it be prosecuted as little to the injury of a government's own citizens as possible. In the prosecution of a war the discretion of a government, so far as the enemy is concerned, takes the place of ordinary constitutional restrictions or statutory provisions."

To relieve the rigor of the situation, the act of March 12, 1863, commonly called the abandoned or captured property act, was enacted. It was a beneficent piece of legislation, and, speaking of it, the court say in Klein's Case, 13 Wall. 128, 138: "There is, so far as we are aware, no similar legislation mentioned in history." It created a right where none existed before, Anderson Case, 9 Wall. 56, and authorized suits under specified conditions for the proceeds of sales of property that had been taken or seized as "enemy property." Although it was recognized, as was said in Lamar v. Brown, 92 U. S. 187, 195, that the United States, during the Civil War, occupied the position of "both belligerent and constitutional sovereign," it was also recognized, and uniformly held, that it was only in virtue of the act mentioned that even the loyal citizen, whether he resided in the one or the other of the sections, could assert in the Court of Claims compensation for his property that had been seized or appropriated as enemy property. The theory of an implied contract arising out of such seizure or appropriation finds no support in the decided cases. In Young's Case, 97 U. S. 39, 67, it was said of the British subject, in whose right the suit was brought: "Collie

has been deprived of no right he ever had. Neither he nor any one similarly situated has ever been permitted to sue the United States in their own courts upon such a claim." See Klein Case, 13 Wall. 128, 137; Moore Case, 10 C. Cls. 375, 383; Haycraft Case, 22 Wall. 81, 92; Hijo Case, 194 U. S. 315.

In the Herrera Case, 43 C. Cls. 430, the plaintiff insisted that there was an implied contract, but this court held it had not jurisdiction under the Tucker Act, and quoted from the Hijo Case, 194 U. S. 315, 320, where it is said: "The vessel was therefore to be deemed enemy's property. It was seized as property of that kind, for purposes of war and not for any purposes of gain." The judgment was affirmed by the Supreme Court. In the course of their opinion, reference is made to the modern rules of war, stated by Kent (1 Kent, 92, 93), and which are in substance urged here, and the opinion proceeds: "If the record presented such a case, the question could be raised whether it presented one for judicial cognizance, even if a court could share the indignation which the learned commentator says all mankind would feel. It is certain that the court's power can not be enlarged by its emotions." Herrera Case, 222 U. S. 558, 572.

The second section of the resolution directed that a survey be made, the results of which should be competent evidence in any proceedings for compensation. This provision is entirely consistent with the idea that Congress intended to reserve for future determination any question of compensation. It falls short of conferring power [fol. 14] upon this court to determine it. It is significant when the policy of legislation during the war is considered that provision was made for action against the Government in all cases where it was intended to confer the right. Notwithstanding this court had the power to hear and determine suits against the Government conferred by section 145 of the Judicial Code, the numerous statutes authorizing requisitions and the taking of private property expressly designated the court where suits could be brought. Some of these conferred jurisdiction on the Court of Claims; some on District courts, and some on both of these courts. Mr. Justice Brandeis, in the Pfitsch case, 256 U. S. 547, 552, says: "A survey of the war legislation permitting the seizure of property discloses that Congress has established three distinct jurisdictions for the purpose of suit against the United States for compensation." He mentions 25 different instances. The Government can not be sued without its consent, and the power to hear and determine suits against the United States should not and does not rest in mere inference or implication. It was said in Haycraft's case, 22 Wall. 81, 92: "A sovereign can not be sued in his own courts except with his consent. This is an action against the United States in its own Court of Claims. The appellant must, therefore, show that consent has been given to its prosecution." Every court must take notice of the limits of its jurisdiction. Reid case, 211 U. S. 529. It was suggested in argument in some of this class of cases that the Government took charge of the railroads under provisions of the national defense act, which did not prescribe a method for ascertaining compensation. But this action taken in

an emergency was followed by a statute, which provided the necessary forum. The trading with the enemy act authorising the Alien Property Custodian to take over and to dispose of enemy property did not permit suits by the enemy owners. Nor does the joint resolution of May 12 authorize suits by the German owners of the vessels. If this resolution can be made the basis of the suits they could have been instituted as soon as the President took action under it. Can it be supposed that the Government intended to open its courts to enemies seeking compensation for property taken from them while the war was yet flagrant? The history of the enactment rebuts any such idea. A joint resolution was introduced and referred in the Senate and in the House. As reported to the Senate by its committee, the joint resolution contained five sections. (Cong. Rec., vol. 55, pt. 2, p. 1572.) The first two sections contained all that was finally adopted. The three other sections purported to authorize suits to be brought by parties interested in the vessels and had provisions relative to suits. By section 5 the suits could be brought in the Court of Claims. All of sections 3, 4, and 5 thus reported were stricken out by amendment in the Senate. (Cong. Rec., vol. 55, pt. 2, p. 1575.) An amendment proposed by Senator Knox authorizing the President to "requisition" the vessels was voted down. (Cong. Rec., vol. 55, pt. 2, pp. 1575, 1576.) The joint resolution as amended was adopted by the Senate, and in that shape was sent to the House, where it was taken up, superseding the one on its calendar, and passed as it came from the Senate. This definite action by the Senate, concurred in by the House, confirms the view that there was no intention to [fol. 15] authorize suits in the Court of Claims on account of the seizure of these vessels. See Pfitsch case, supra.

The plaintiff argues that the United States did not confiscate or intend to confiscate the property and that the taking must consequently be referred to the power of eminent domain with a duty to make compensation. What we have said sufficiently answers this contention. We do not think it necessary to assert that there was a confiscation, nor to deny that the Congress may have intended that the United States would at some time account for the vessels or their ascertained value. If this court is without jurisdiction, its conclusions upon these questions would probably be coram non judice. The result, however, in this case, would not be altered if the proper conclusion were that the taking over of the vessels amounted to a sequestration of them. The act authorizing their seizure did not confer power on the Court of Claims to entertain the present suit, nor does its general jurisdiction extend to suits of this kind. It was said in Haycraft's case, supra: It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided."

The demurrer should be sustained. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Booth, Judge, concur.

[fol. 16] V. Order of Court Sustaining Defendant's Demurrer and Dismissing Petition—Entered March 17, 1924

This case was submitted upon the defendant's demurrer to the plaintiff's petition. Upon consideration whereof, the court being of opinion that the said demurrer is well taken doth adjudge and order this 17th day of March, 1924, that the said demurrer be and the same is sustained, and the petition is dismissed.

See opinion in this cause this date.

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VI. Plaintiff's Application for and Order Allowing Appeal—Filed June 16, 1924

Now comes the claimant in the above-entitled cause and moves the court for the allowance of an appeal from the judgment of this court entered herein on the 17th day of March, 1924, to the Supreme Court of the United States.

Katz & Sommerich, Attorneys for Claimant

Ordered: That the above application for appeal be allowed as prayed for.

By the Court.

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[fol. 17] In Court of Claims

[Title omitted]

Clerk's Certificate

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the opinion of the court by Campbell, Ch. J.; of the order of court sustaining the defendant's demurrer and dismissing the plaintiff's petition; of the plaintiff's application for appeal and of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Twenty-third day of June, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 30,476. Court of Claims. Term No. 511. Deutsch-Australische Damfschiffs-Gesellschaft, appellant, vs. The United States. Filed July 5th, 1924. Filed No. 30,476.

IN THE

# Supreme Court of the United States

October Term, 1927

OCT 4 1927
CLE

No. 1. Rhederei M. Jebsen Company, Appellant, v. The United States.

No. 2. The Firm of M. Jebsen, etc., et al., Appellants, v. The United States.

No. 3. Hamburg-American Line Terminal & Navigation Company, Appellant, v. The United States.

No. 4. Hamburg-American Line Terminal & Navigation Company, Appellant, v. The United States.

No. 5. Atlas Line Steamship Company, Appellant, v. The United States.

No. 6. Atlas Line Steamship Company, Appellant, v. The United States.

No. 7. North German Lloyd, Appellant, v. The United States.

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No. 11. Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft (also known as Hamburg-American Line), Appellant, v. The United States.

No. 12. Deutsch-Australische Dampfschiffs-Gesellschaft, Appellant, v. The United States.

## APPEALS FROM THE COURT OF CLAIMS.

**Amended Motion to Pass Cases and to Assign Them for Argument on First Monday of May, 1928.**

WILLIAM B. DEVOE,
*Counsel for Appellants* in Nos. 3, 4, 5, 6, 10 and 11.
EDGAR W. HUNT,
*Counsel for Appellants* in Nos. 7, 8 and 9.
MAXWELL C. KATZ,
*For Counsel for Appellants* in No. 12.

IN THE

# Supreme Court of the United States

October Term, 1927

No. 1. Rhederei M. Jebsen Company, Appellant, v. The United States.

No. 2. The Firm of M. Jebsen, etc., et al., Appellants, v. The United States.

No. 3. Hamburg-American Line Terminal & Navigation Company, Appellant, v. The United States.

No. 4. Hamburg-American Line Terminal & Navigation Company, Appellant, v. The United States.

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No. 12. Deutsch-Australische Dampfschiffs-Gesellschaft, Appellant, v. The United States.

APPEALS FROM THE COURT OF CLAIMS.

Amended Motion to Pass Cases and to Assign Them for Argument on First Monday of May, 1928.

This amended motion is filed pursuant to leave granted in open Court, on October 3, 1927.

Now come the appellants in Numbers 3 to 12, both inclusive, of the above-entitled actions, by their attorneys in that behalf, duly authorized, and respectfully move the Court that all the above-entitled actions, Numbers 1 to 12, both inclusive, be passed when called for argument in their regular order and be assigned for argument for the first Monday of May, 1928; and as grounds for this motion assign the following:

1. These are the so-called "German Ship Cases," and the appellants therein claim compensation for ships and other property expropriated by the United States during the late war with Germany. They are before this Court on appeal from judgments of the United States Court of Claims, which sustained demurrers interposed by the Government and dismissed the complaints in all of said actions on the ground that said Court had no jurisdiction.

2. All twelve of said actions were heard together in the Court of Claims, which, selecting the above-entitled action Number 12 as a typical ship case, delivered therein an opinion stating the grounds and reasons for its decision; and disposed of all the other cases (including Numbers 1 and 2) by memoranda referring to said opinion. (For said opinion, see 59 Ct. Cls., 450; for the memorandum disposing of Numbers 1 and 2, see Ibid., 462.)

3. The ships formerly owned by appellants in Numbers 1 and 2, like those owned by the appellants in the other cases, were taken by the United States under authority of a Joint Resolution of Congress, approved May 12, 1917 (Chapter 13, 40 Stats., 75), and appellants in all of said cases which involved the taking of

ships rely upon said Joint Resolution as the foundation of their respective claims. (See Petitions to Court of Claims, printed in Record of the respective cases in this Court.) Since the passage of the Joint Resolution of May 12, 1917, no legislation has been enacted that alters or affects legal rights or remedies (whatever they may be) arising in consequence of the taking of any ship or ships under said Joint Resolution. The ships taken from appellants in Numbers 1 and 2, like those taken from appellants in the other cases, were at the time of taking under German flag and register, and their owners were German subjects or corporations formed under the laws of one or another of the constituent States of the German Empire, as existing in 1917; appellant in Number 1 being then a corporation organized under the laws of the German Province of Schleswig-Holstein, and appellants in Number 2 being German subjects who were residents of said Province (see Petitions to Court of Claims, printed in Record of actions Numbers 1 and 2).

4. The Danish nationality now alleged to be possessed by appellants in Numbers 1 and 2 is stated in their petitions in the Court of Claims (see Record in Number 1, paragraph 1, and appellants' brief in Number 1—(Number 102 of the October 1925 Term of this Court)—page 25) to have been acquired by virtue of a plebiscite held pursuant to Articles 109, 112 of the Treaty of Versailles. The date is not stated, but the Court will take judicial notice of the fact that the Treaty of Versailles was not signed until June, 1919, and that ratification, necessary to make it effective as among any of the signatory powers, did not occur until sometime later.

The Government argues this group of cases in one

brief, and, taking the above-entitled action Number 1 (No. 102 of the October Term, 1925) as a typical ship case, discusses it at length; and, in answering the claims of the other appellants in their respective ship cases, merely refers to its argument in the above-entitled Number 1, saying, "These cases differ in no special respect from Number 102 (Rhederei M. Jebsen vs. The United States)" * * * and "The brief for the Government in Number 102 (Rhederei M. Jebsen Company vs. The United States) covers every question in these cases." The Government's brief does not at all refer to the Treaty of Versailles or the newly-acquired Danish citizenship of appellants in Numbers 1 and 2.

5. Appellants in Numbers 1 and 2 were the owners of two ships, comprising together about 3,000 tons, gross register, out of 106 ships, comprising altogether about 640,000 tons, gross register, of merchant ships taken by the United States under said Joint Resolution, and recovery of the value of which is sought in the above-entitled actions. The two ships owned by appellants in Numbers 1 and 2 were cargo vessels of relatively low speed, while about two-thirds of the aggregate tonnage taken consisted of passenger, or combined passenger and cargo, ships of relatively high speed, so that it can not be said that appellants' 3,000 tons, gross register, fairly represent as much as 3/640ths in value of the expropriated vessels.

6. H. R. 15009 was passed in the House of Representatives at the last session (69th Congress, 2d session) by a vote of 279 to 66. It provided for the appointment of an arbitrator to determine the value of the expropriated ships, one radio transmission station,

and a comparatively small number of patents taken and used by the United States Government itself (not patents sold by the Alien Property Custodian and involved in the Chemical Foundation case). The Bill limited the awards to be made by the arbitrator to an amount not to exceed $100,000,000. Having regard to the possible maximum value of the radio station and patents, it was conservatively estimated that this provision would allow awards of at least $85,000,000 as compensation for ships. The Bill authorized an initial appropriation of $50,000,000 on account of the arbitrator's awards.

7. This bill also contained the following provisions:

"*Declaration of Policy*

"Sec. 2. In pursuance of established American doctrine, it is hereby declared that the claims of nationals of the United States against Germany, as determined by the Mixed Claims Commission, United States and Germany, shall be settled by the ultimate payment in full by Germany; that all property of German nationals held by the Alien Property Custodian as security for the payment of such claims of nationals of the United States against Germany shall ultimately be returned, together with the accrued interest and other earnings thereon; that the claims of German nationals against the United States for reasonable compensation for certain of their ships, radio stations, and patents taken or used by the United States shall be adjudicated and the amounts determined to be due shall ultimately be paid in full.

* * * * * * * * *

"Sec. 4

* * * (o) No award or tentative award shall be made by the Arbiter in respect of any claim if (1) such claim is filed after the expiration of four months from the date on which the Arbiter takes

office, or (2) any judgment or decree awarding compensation or damages in respect thereof has been rendered against the United States, and if such judgment or decree has become final (whether before or after the enactment of this Act), or (3) any suit or proceeding against the United States, or any agency thereof, is commenced or is pending in respect thereof and is not dismissed upon motion of the person by or on behalf of whom it was commenced, made before the expiration of six months from the date on which the Arbiter takes office and before any judgment or decree awarding compensation or damages becomes final."

* * * * * * * * *

*"Definitions*

"Sec. 14. As used in this Act—

(a) The term 'person' means an individual, partnership, association, or corporation.

(b) The term 'German national' means—

"(1) An individual who, on April 6, 1917, was a citizen or subject of Germany, or who, on the date of the enactment of this Act, is a citizen or subject of Germany.

"(2) A partnership, association, or corporation, which on April 6, 1917, was organized or created under the law of Germany but excluding any such partnership, association, or corporation, more than 50 per centum of the interest or voting power in which was on April 6, 1917, or on the date of the enactment of this Act, vested (directly or indirectly) in citizens or subjects of Austria, Hungary, or Austria-Hungary.

"(3) An individual (other than a citizen or subject of Austria, Hungary, or Austria-Hungary) whose claim is based upon an interest on April 6, 1917, in a partnership, association, or corporation excluded under paragraph (2).

"(4) The Government of Germany."

8. When the Bill came to the Senate it was referred to the Committee on Finance, which, by its Chairman, Mr. Smoot, submitted a report recommending its passage with certain amendments. From the report the following is quoted:

> "(3) The United States Government seized or acquired during the war for its own use certain property (notably ships, patents, and a radio station). Although the United States paid the Alien Property Custodian for the patents and the radio station acquired from him, it has paid no compensation for the ships. Consequently, some provisions must be made for the payment of the amounts justly due."
>
> * * * * * * * * *
>
> "One hundred and six ships were taken over. Some of them have been sold, some were chartered, some destroyed during the war, some have been scrapped, and some are still being operated by agencies of the United States. Upon all the ships in operation, considerable sums have been expended for betterments, improvements and repairs. It is obviously impossible to return them to their original owners. Consequently the United States has no choice but to pay for them."

9. On March 3, 1927, Senator Smoot, on the floor of the Senate, stated that the Committee on Finance had further modified the Bill so as to strike out any reference to radio stations and patents and fixed the maximum amount possible to be awarded for the ships at $85,000,000. The following is quoted from page 5552, first column, of the Congressional Record of March 3, 1927 (by Mr. Smoot):

> "Disagree to the committee amendment which strikes out from page 6, line 19, to page 17, line

22, and inserts new matter." The effect of this, in substance, is to restore the original House provisions, subject, however, to certain relatively slight amendments, the most important of which is the following:

"On page 10, line 14, strike out $100,000,000 and insert in lieu thereof $85,000,000."

Mr. Smoot also said (Ibid., second column):

"Mr. President, I will say to the Senate that if these amendments shall be agreed to, I have as much assurance as I could have from individuals that the bill, together with the amendments, will be passed by the House of Representatives; and I hope that the occasion will now arise when the importance of the bill will be definitely decided in the minds of Senators and they will realize what it means if it shall fail of passage."

10. The Bill failed of passage in the Senate solely because of the filibuster carried on during the last four or five days of the session. Senators of both parties repeatedly sought to have it brought to a vote, declaring that it ought to be passed. No Senator expressed any opposition to its passage, but solely by reason of the filibuster it was not permitted to be voted upon. In that respect it was treated exactly as were the Deficiency Appropriation Bill and Public Buildings Bill, two of the most important among the many measures that because of the filibuster could not be brought to a vote.

11. The U. S. Daily of July 16, 1927, printed what purports to be a literal quotation of a statement by Representative Oldfield of Arkansas, from which the following excerpt is taken:

"I take it for granted that Congress, regardless of political partisanship, will want first of all to take care of the Mississippi Valley situation. Then will come the tax reduction, the returning to their owners of the alien property held in the custody of the Alien Property Custodian, the disposition of Muscle Shoals, and the Boulder Dam proposition. These are the major matters that will be considered by the incoming Congress. Of course, added to these, are the appropriation bills, the supply measures for running the machinery of Government, that must be passed before Congress adjourns next summer."

The same paper, in the same issue and article, states:

"Representative Hawley (Rep.) of Salem, Oregon, who reported the alien property bill to the House at the last session, recently stated orally that he expects to reintroduce it in the new Congress and expects it to become law."

12. The U. S. Daily of July 15, 1927, under the head lines:

"Treasury Desires That Congress Act on Alien Property.
Legislation at Next Session Expected to Provide Return of Seizures During War."

prints the following:

"The Department of the Treasury is hopeful that Congress at its next session, will enact legislation disposing of the tangled alien property question, according to the Acting Secretary of the Treasury, Ogden L. Mills."

* * * * * * * * *

"'If, as seems likely,' said Mr. Mills, 'most of the property involved is owned in Germany, its early return might facilitate payments under the Dawes reparation settlement in the next few years. This property does not belong to the United States and should be restored to the rightful owners.'

"A bill to restore the property and to pay the American claims was considered at the last session of Congress but failed to become law. This bill on which hearings were held by the House Committee on Ways and Means was prescribed by the Acting Secretary as satisfactory to the Department and he hoped that it would take precedence even over tax legislation. He said he saw no valid reason why, after being reintroduced, it should not be acted on by Congress at an early date inasmuch as it has been thoroughly discussed and most members of the House and Senate are familiar with all of the questions involved."

13. The Journal of Commerce of New York (August 5, 1927) prints the following under a Washington headline:

"Early passage of the bill to return to former owners the property still under the control of the Alien Property Custodian is anticipated by Under Secretary of the Treasury Ogden L. Mills.

* * * * * * * * *

"Similarly optimistic is the Alien Property Custodian, Howard P. Sutherland. He feels that the matter should be brought to a termination since it is now nearly ten years since the close of the war."

14. The U. S. Daily of August 9, 1927, prints a long article purporting to state views expressed by Senator Smoot, the first paragraph of which is as follows:

"Senator Smoot (Rep.), Utah, Chairman of the Senate Committee on Finance, in an oral statement on August 8, predicted that legislation for the disposal of property now held by the Alien Property Custodian would be enacted during the next session of Congress."

## CONCLUSION.

It is respectfully submitted:

(a) That the steps actually taken in Congress at the last session, together with statements made by responsible officers of the Government since, as above set forth, reasonably indicate a strong probability that action will ensue at the coming session, rendering a decision in these cases not only unnecessary but in a practical sense nugatory.

If the legislation enacted shall be unacceptable to the appellants in Numbers 1 and 2 (as counsel in these cases intimated in open court on October 3), they will if this motion is granted have opportunity in May to argue and submit their cases to this Court; and, if their claim of a special status based upon newly-acquired Danish nationality is valid, their rights will be unaffected by legislation relating to the rights of *German* ship owners alone.

(b) In so far as the Court may deem it proper, in disposing of this motion, to take into consideration the desires of parties and counsel, it would seem reasonable to postpone at the request of the owners of 637,000 registered tons rather than to proceed to argument at the request of the owners of 3,000 registered tons, despite the secondary claim asserted in Numbers 1 and 2 that the acquisition of Danish nationality, subsequent to June, 1919, *ipso facto* alters the legal consequences flowing from the taking in 1917 of property whose owners were then concededly of German nationality.

Respectfully submitted,

WILLIAM B. DEVOE,
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EDGAR W. HUNT,
*Counsel for Appellants* in Nos. 7, 8 and 9.

MAXWELL C. KATZ,
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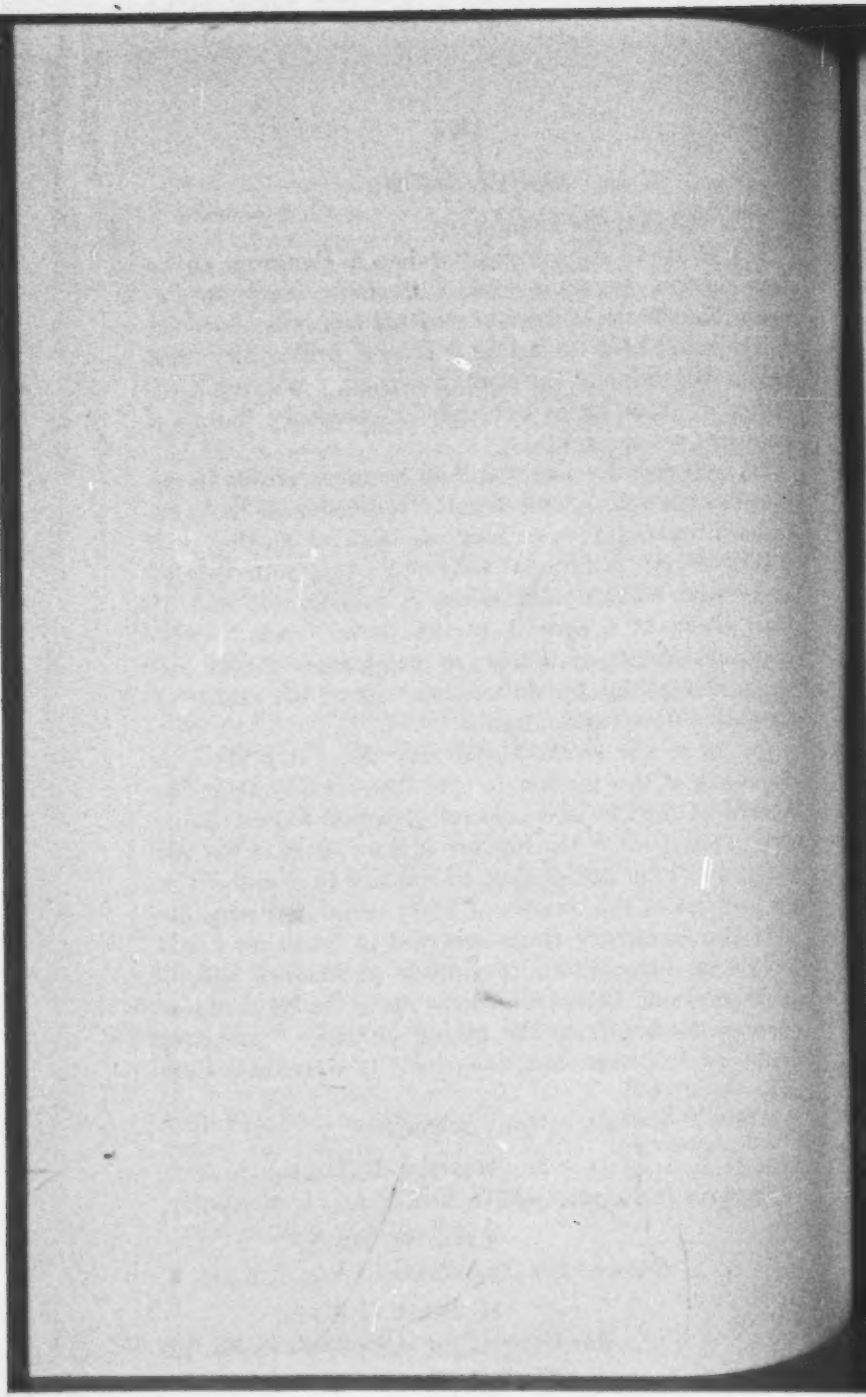

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No. 12. Deutsch-Australische Dampfschiffs-Gesellschaft, Appellant, v. The United States.

## APPEALS FROM THE COURT OF CLAIMS.

## Objections to the Motion to Pass and Reassign Cases No. 1 and 2.

WILLIAM F. NORMAN,
JAMES J. LYNCH,
*Attorneys for Appellants* in Cases Number 1 and 2.
DANIEL R. WILLIAMS,
*Of Counsel.*

IN THE

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## APPEALS FROM THE COURT OF CLAIMS.

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Objections to the Motion to Pass and Reassign Cases No. 1 and 2.

Appellants in cases Number 1 and 2, Rhederei M. Jebsen Company and The Firm of M. Jebsen, etc., *et al,* respectively, submit herein their objections to the motion made on behalf of the appellants in cases Number 3 to 12, inclusive, to wit, that cases Number 1 to 12 be passed and reassigned:

I. Appellants in Numbers 1 and 2 have not agreed to consolidate their cases with appellants in Numbers 3 to 12; nor have they agreed that all the cases should be heard together.

Separate appeals were perfected by appellants in Numbers 1 and 2 and briefs were filed by them without conferring with counsel for appellants in Numbers 3 to 12, and without regard to the questions advanced in the latter cases.

II. Appellants in Numbers 1 and 2 are Danish subjects, having become such pursuant to the plebiscite ordered by Article 109 of the Treaty of Versailles, which plebiscite provided that the zone in which Apenrade (the residence of appellants in Numbers 1 and 2) is situated should determine whether that zone should remain a part of Germany or become territory of Denmark. Under such plebiscite the zone referred to voted to return to Denmark and has now become incorporated as a part of the latter country. By Article 112 of the Treaty of Versailles, it is provided:

> "But the inhabitants of the territory which was returned to Denmark will acquire Danish nationality *ipso facto* and will lose their German nationality."

By Article 278 of the Treaty of Versailles it is provided:

"Germany undertakes to recognize *any new nationality* which has been, or may be, acquired by her Nationals under the laws of the allied powers in accordance with decisions of the competent authorities of those powers, *pursuant to naturalization laws or under treaty stipulations*, and to regard such persons as having, in consequence of the acquisition of such new nationality, *in all respects severed their allegiance to their country of origin.*"

Furthermore, Sub-division (i), Article 297 of the Treaty provides:

"Germany undertakes to compensate her Nationals in respect to the sale or retention of their property, etc."

In view of this situation the articles of the Treaty referred to have established the following:

1. That Germany is obligated to recognize the new nationality of appellants Number 1 and 2 and to deem them as having "severed their allegiance" to their country of origin, *i. e.*, Germany;

2. That Germany's obligation to compensate her Nationals precludes the appellants in Numbers 1 and 2 from seeking compensation from Germany;

3. That the appellants become *ipso facto*, and are now, Danish subjects, and have forfeited their rights to demand indemnity from Germany on account of the loss of its ships. Unless, therefore, payment is made by the United States for said ships, then we have the anomalous situation of these appellants suffering a total loss of their property as Danish citizens, whereas had they remained of German nationality, they would now be entitled to compensation under the agreement of Germany. *This change of status of former German subjects under the Versailles Treaty, with the new obligations of our government with respect thereto, has been expressly recognized by Congress and also by the Treaty concluded by the United States with Germany in August, 1921, wherein and whereby the*

*United States accepts and adopts the whole of Part 10 of the Treaty of Versailles, in which Part Article 297 is included.*

To meet this situation, and to do equity to those who ceased to be German subjects by virtue of Treaty provisions, the United States Congress, by amendment of June 5, 1920, to the "Trading with the Enemy Act," provided as follows:

> "Provided, that no person shall be deemed or held to be a citizen or subject of Germany or Austria or Hungary or Austria-Hungary for the purposes of this section, *even though he was such citizen or subject at the time first specified in this sub-section*, if he has become or shall become *ipso facto* or through exercise of option, a citizen or subject of any nation or State or free city *other than Germany, Austria or Hungary* (first) under the terms of such treaties of peace as have been or may be concluded subsequent to November 11, 1918, between Germany or Austria or Hungary (of the one part) and the United States and/or three or more of the following named powers: The British Empire, France, Italy and Japan (of the other part)."

It will thus be seen that appellants in cases Number 1 and 2, having acquired Danish nationality prior to the ratification of the treaty between the United States and Germany of 1921 (under which treaty Germany assumed to relieve the United States of all obligations with reference to the payment of her Nationals for property seized), lost all right to claim or receive compensation from Germany for losses suffered at the hands of the allied or associated powers. (42 Stats. at Large, Part 2, Sec. 5.)

Appellants in cases Number 1 and 2 do not now insist that they *acquired* additional rights by virtue of this change of status, but they do insist that by virtue

of the treaty referred to, they occupy a position in this court which is dissimilar and distinct from that occupied by appellants in Numbers 3 to 12, both as to questions of law and questions of fact.

III. It is not our desire to prejudice the rights of the other appellants, but inasmuch as the opinion of the Court of Claims refers to the decisions of this court in the cases of *Hijo v. United States*, 194 U. S. 315, and *Herrara v. United States*, 222 U. S. 558, it is our duty to call the court's attention to the fact that whatever effect these decisions may have on the rights of the other appellants, they can not affect the rights of the appellants in cases Number 1 and 2. In the *Herrara Case* the court said:

> "* * * If Spanish subjects, under the authority of the case of Hijo v. United States, their *right of indemnity* for the seizure and use of their vessels was *taken away* by the treaty between Spain and the United States."

Inasmuch as appellants in actions Number 1 and 2 became Danish subjects prior to the treaty between Germany and the United States, they submit that *their rights* were not "taken away" by this treaty, in which Germany assumed the obligation to indemnify her own nationals.

This very serious distinction between the rights of appellants in cases Number 1 and 2 and the other appellants is too obvious for discussion. *In the face of this treaty with Germany we may readily understand why counsel for the appellants in the other cases are so anxious for congressional relief.* The insistence of appellants in cases Number 1 and 2, set out in our brief, filed in this court, at pages 25 to 27, is that they have a right to recover in this court under *an implied*

*contract* and that this right was not prejudiced by any subsequent treaty.

IV. The proposed bill referred to in the motion, which counsel for appellants in Numbers 3 to 12 insist will probably be passed by Congress at the next session, does not give to appellants in Numbers 1 and 2 complete relief. It only provides for partial payment and for long delay on the balance. The fact that the appellants in Numbers 3 to 12, *in view of their situation*, prefer to accept the hoped-for congressional relief rather than the amount sued for is no reason why the appellants in Numbers 1 and 2 should be delayed in the hearing of their cases at the request of litigants who are not interested therein nor parties thereto.

It is, therefore, respectfully submitted:

That counsel filing this motion have no right to control the time or manner of the hearing of cases Number 1 and 2, in which briefs have been filed in this court *for more than two years* and the cases twice continued, upon the representation of counsel for appellants in Numbers 3 to 12 that they had been assured that a measure for the relief of all the appellants would be enacted by Congress;

And that, notwithstanding the difference in the amounts involved and the benefit which might result to appellants in Numbers 3 to 12 by way of congressional relief, counsel for appellants who are not seeking such relief can not accede to this motion, for to do so would be to prejudice the interests of said appellants, which our duty to them will not permit.

Respectfully submitted,

WILLIAM F. NORMAN,
JAMES J. LYNCH,
*Attorneys for Appellants* in Cases Number 1 and 2.
DANIEL R. WILLIAMS,
*Of Counsel.*